In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 555

GENERAL INSTRUMENT CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 15a-20a) is reported at 319 F. 2d 420. The Board's decision and order in the unfair labor practice case (Pet. 21a-29a) are reported at 140 NLRB No. 6. The Board's decision and direction of election in the representation case (Pet. 32a-34a), and its order denying reconsideration (Pet. 30a-31a), are unreported.

JURISDICTION

The decree of the court of appeals (Pet. 13a-14a) was entered on June 3, 1963. Its order denying rehearing (Pet. 1a) was entered on July 17, 1963. The

petition for a writ of certiorari was filed on October 15, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 2101.

QUESTION PRESENTED

Whether the Board abused its discretion under Section 9(b) of the National Labor Relations Act in finding that the technical employees in the Thermo-Electric Division of the Company's Newark plant constituted an appropriate unit for purposes of collective bargaining.

STATUTE

The relevant provisions of the National Labor Relations Act are set forth in Appendix B to the petition.

STATEMENT

A. The Board's Findings and Conclusions

Petitioner manufactures electronic devices at its plant in Newark, New Jersey (J.A. 9).[1] The Thermo-Electric Division in that plant prepares technical proposals and technical reports (J.A. 10). Fifteen employees of this division are laboratory workers, and the remaining seventeen are engineers. For purposes of classification of bargaining units, the laboratory workers come within the category of "technical employees," while the engineers are "professional employees." (J.A. 10, 15-16.)

On September 11, 1961, the International Union of Electrical, Radio and Machine Workers, AFL-CIO, herein the IUE or the Union, filed a representation petition under Section 9(c) of the Act. Pursuant to

[1] "J.A." references are to the Joint Appendix printed for the use of the court below and filed with the petition.

its petition as amended during the proceeding, the Union sought to represent a unit consisting solely of the technical employees in the Company's Thermo-Electric Division. The Company, on the other hand, sought a unit composed of both the technical and the professional employees. (J.A. 9-10, 22.) The Regional Director found that the professional employees (the engineers) were paid on a salaried basis, all performed duties which required the exercise of discretion and independent judgment, and all had a graduate engineering degree or its equivalent, or were matriculating toward such a degree (J.A. 10-12, 15-16). He found that the technicians (the laboratory workers) were all hourly rated employees, worked under the guidance of the engineers, and did not have the advanced educational training possessed by the engineers (J.A. 12-14). Nevertheless, the Regional Director concluded that, since both groups of employees worked in the same general area and in close collaboration, the technical and the professional employees taken together would constitute an appropriate unit (J.A. 14-15). He directed that separate elections be held in each of the two groups; that the professionals be polled not only on whether they desired the Union but also on whether they desired to be in the unit with the technicals; that, if the professionals voted for inclusion, their votes on the Union would be counted; that, if the professionals voted against the inclusion, the technical employees alone would constitute the appropriate unit.[2] (J.A. 9-10, 17-19.)

[2] Section 9(b)(1) of the Act provides that the Board may not include professional employees and non-professional employees in the same unit "unless a majority of such professional employees vote for inclusion in such unit."

On review of the Regional Director's Decision and Direction of Election, the Board reached a contrary conclusion. Although the Board accepted the Director's findings of fact, it found that the technical employees comprised a sufficiently homogenous and distinct grouping of employees to constitute, by themselves, an appropriate unit and it held that a unit of technicals alone was appropriate here (J.A. 22, 28). Accordingly, the Board vacated the election which had been held in the professional employees' voting group and directed that only the votes of the technicians' group be counted (J.A. 23). The Company filed a motion for reconsideration which was denied by the Board (J.A. 28-29). Meanwhile, the Regional Director, finding that a majority of the employees in the technicians' group had voted for the Union, certified the Union as the bargaining representative of the technical employees (J.A. 24-26).

The company then refused to bargain with the Union on the ground that the bargaining unit was invalid, and a complaint was issued alleging that the refusal violated Section 8(a)(5) and (1) of the Act. The Board, after hearing, sustained the complaint and ordered the Company to bargain with the Union. (J.A. 30-34, 56-63.)

B. The Decision of the Court of Appeals

The court of appeals held that the Board did not exceed its authority under Section 9(b) of the Act in finding that the technical employees alone constituted an appropriate unit. The court therefore enforced the Board's order in full. (Pet. 15a-20a.)

ARGUMENT

The decision of the court of appeals is correct, and is not in conflict with the decision of any other circuit. There is no occasion for further review.

1. This Court has recognized that Section 9(b) of the Act confers upon the Board broad discretion in respect to defining what shall constitute an appropriate unit for purposes of collective bargaining, and that the Board's unit determination is entitled to stand unless it is plainly unreasonable. *May Department Stores* v. *National Labor Relations Board*, 326 U.S. 376, 380; *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491. The court below correctly concluded that there was ample basis for the Board's finding that a unit of technicals alone constituted an appropriate unit in this case. As the court pointed out (Pet. 18a): "Working conditions, hourly wage scales, job specifications, and advancement opportunities indicate that the technicals have a strong common bond; different levels of education, job specifications; wage basis, advancement opportunities and, significantly, professional status, support a finding that sufficient distinctions between the technicals and the professionals exist to support a separation."[3] Nor is it relevant that a unit of both technical

[3] The Board has frequently found that, because technical employees differ from other employees in interests, background, and function, a separate unit of technicals is appropriate, particularly where it is petitioned for. See, *e.g.*, *Armstrong Rubber Co.*, 144 NLRB No. 144, 54 LRRM 1197; *Meramec Mining Co.*, 134 NLRB 1675, 1676-1677; *Litton Industries of Maryland, Inc.*, 125 NLRB 722, 724-725; *Boston Edison Co.*, 51 NLRB 118, 121. The Board has found a unit of technicals to be appropriate even where, as here, it was contended that the technicals should be combined with professional employees. See *Tele-Dynamics Division, American Bosch Arma Corp.*, 132 NLRB 748; *DIFCO Laboratories, Inc.*, 129 NLRB 887; *Vickers, Inc.*, 124 NLRB 1051.

and professional employees might also have been appropriate. The fact that the Board has selected one appropriate unit rather than another merely shows that the Board has exercised its discretion under the Act, not that it has abused it.[4]

2. Petitioner's contention (Pet. 9-13) that the Board's unit determination depends on the circumstance that it was the union rather than the employer who filed the petition rests on an erroneous premise. The Regional Director, in finding that a combined unit of technicals and professionals was appropriate, relied on *Reynolds Electrical and Engineering Co.*, 133 NLRB 113 (J.A. 17, n. 7), where the Board had placed technical and professional employees in one unit although the union had only claimed to represent certain technicals.[5] Reversing the Regional Director, the

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[4] See, *e.g.*, *Mountain States Telephone and Telegraph Co.* v. *National Labor Relations Board*, 310 F. 2d 478, 480 (C.A. 10); *National Labor Relations Board* v. *Local 19, International Brotherhood of Longshoremen*, 286 F. 2d 661, 664 (C.A. 7), certiorari denied, 368 U.S. 820; *National Labor Relations Board* v. *Burroughs Corp.*, 261 F. 2d 463, 466-467 (C.A. 2).

[5] In *Reynolds*, the employer had a medical division which included 15 first-aid attendants, a laboratory technician, an X-ray technician, 2 nurses, and a pharmacist. The union demanded recognition for the 15 first-aid attendants, and the employer filed a petition for an election among these attendants. At the hearing, the employer in effect amended his petition, contending that the appropriate unit was the entire medical division. The Board found that the unit sought by the union was not appropriate because it did not include all the technicals, omitting the laboratory and X-ray technicians. The Board concluded, however, that the unit sought by the employer—which included all of the technical employees and also the nurses and the pharmacist, who were professional employees—was an appropriate one. Since the union did not object to representing the larger unit, the Board directed an election in that unit, giving the professionals an opportunity to vote separately on whether they desired to be included.

Board pointed out that *Reynolds* was "distinguishable on its facts," and added that there "the Employer-Petitioner sought a departmental unit which included both professional and technical employees, and no showing of interest was required" (J.A. 22, n. 3). Singling out this last statement, petitioner concludes that the sole reason for the difference between this case and *Reynolds* is that here the representation petition was filed by the union while there it was filed by the employer. However, *Reynolds* is distinguishable from the instant case for reasons entirely unrelated to the showing-of-interest requirement, which applies only to petitions by labor organizations.

As the Board emphasized (J.A. 22), the Union here "seeks to represent only the technical employees and does not desire to represent the professionals." In *Reynolds*, on the other hand, although the union originally made a representation claim limited to some of the technical employees, it did not object to representing the professionals (see *supra*, p. 6 n. 5). In a case such as this one, where a union does not desire to represent a group of employees, the Board will not force it to do so, whether the petition be filed by the union or by the employer. Unless, as in this case, an appropriate unit can be established without the inclusion of the group disclaimed by the union, the Board will dismiss the petition.[6] Thus, the fact that the union in *Reynolds* did not object to representing the professional employees, whereas the Union here

[6] For cases where the Board has taken the willingness of the union to represent the employees into account even though the employer filed the petition, see, *e.g.*, *Restaurant & Tavern Owners Association of Salem*, 126 NLRB 671; *The Housatonic Public Service Co.*, 111 NLRB 877; *Coeur D'Alene Grocers Association*, 88 NLRB 44; *Ny-Lint Tool & Manufacturing Co.*, 77 NLRB 642.

did, affords a substantial basis for distinguishing the two cases.

This ground of distinction obviously does not depend on whether the employer or the union filed the petition. Similarly, it does not depend upon whether the union has made a showing of interest among the employees excluded from the unit chosen by the Board, although a lack of any showing of interest among a discrete class of employees is some evidence of the union's unwillingness to represent this class.[7]

3. There is likewise no merit to petitioner's contention (Pet. 14-19) that the Board's unit finding is contrary to Section 9(c)(5) of the Act, which provides that extent of organization shall not be "controlling" in determining whether a unit is appropriate. Even assuming that the Board considered the extent of organization, Section 9(c)(5) does not preclude the Board from taking account of this factor in choosing between two appropriate units but merely from using it as the sole basis for finding that a unit is appropriate. Since, as we have shown above (pp. 3, 5), the unit of technical employees was otherwise appropriate on the basis of objective factors long accepted as legitimate, the Board would not violate Section

[7] Since in this case the Board concluded even without reference to the Union's showing of interest that the Union did not wish to represent professional employees, the Board's choice between appropriate units did not depend upon the fact that the Union made a showing of interest only among the technical employees. The Company was therefore not prejudiced by its inability to contest the validity of that showing (see Pet. 20-21). In any event, petitioner's contention that it was prejudiced comes too late since it was not asserted in the court below. See *Lawn* v. *United States*, 335 U.S. 339, 362, n. 16; Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, Sec. 418 (2d ed., Wolfson & Kurland, 1951).

9(c)(5) by treating both the extent of organization and the Union's unwillingness to represent the professional employees as reasons for preferring this unit to that chosen by the Regional Director.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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